GAN YOOK CHIN & ANOR

v.

LEE ING CHIN & ORS

FEDERAL COURT, PUTRAJAYA
HAIDAR MOHD NOOR CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
[CIVIL APPEAL NO: 02-7-2003 (M)]
23 AUGUST 2004

SUCCESSION: *Probate - Validity of will - Principles applicable - Whether deceased had testamentary capacity - Whether trial court erred in determining issue of forgery - Whether there were suspicious circumstances - Whether Court of Appeal had erred in law or in fact*

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Test to be applied for appellate intervention - Whether Court of Appeal applied correct test*

SUCCESSION: *Probate - Testamentary capacity - Testator in failing state of health - Whether testator had testamentary capacity*

EVIDENCE: *Witness - Credibility of - Witnesses to execution of will - Whether witnesses had any interest in case*

EVIDENCE: *Expert evidence - Conflicting testimony - Principles applicable - Issue of forgery - Whether trial court had erred in determining such issue substantially on evidence of handwriting experts to exclusion of relevant and direct evidence of actual witnesses*

SUCCESSION: *Probate - Validity of will - Allegation of suspicious circumstances - Whether adequately disposed of - Whether there was any substantial merit to allegation*

CIVIL PROCEDURE: *Appeal - Appeal from High Court to Court of Appeal - Whether Court of Appeal adopted correct approach in determining whether there was a valid ground of appeal*

This was an appeal by the appellants against the decision of the Court of Appeal admitting to probate a will purportedly executed by one Gan Puay Chee ('the deceased'), granting *inter alia* specific legacies to the deceased's daughters, the appellants herein, and the residual estate to his sons, the respondents herein. The appellants, being unhappy with the will, brought an action in the High Court to declare it invalid. They relied essentially on two grounds *ie*, that the deceased was at the material time so enfeebled by illness that he was incapable of having a sound mind so as to dispose his properties, and that the will was a forgery. The High Court found in favour of the appellants; however, upon appeal by the respondents, the Court of Appeal reversed the High Court judgment. Hence, the present appeal.

The appellants, whose grounds of appeal could be categorised under five specific heads, submitted: (i) that the Court of Appeal, instead of adopting the established "plainly wrong" test, had applied a new technique of appellate intervention called "insufficient judicial appreciation of the evidence"; (ii) that the deceased lacked the necessary testamentary capacity to make the will; (iii) that the Court of Appeal had dealt erroneously with the High Court's finding of forgery; (iv) that the Court of Appeal had treated dismissively the various suspicious circumstances in the evidence adduced by the respondents at trial; and (v) that the Court of Appeal had adopted the so-called "Flannery" approach in the English case of *Flannery v. Halifax Estates Agencies Ltd* which purportedly established the principle that inadequate reasoning or an inadequate judgment by a trial judge would itself be a valid ground of appeal.

Held (dismissing the appeal)

Per Steve Shim CJ (Sabah & Sarawak) delivering the judgment of the court:

[1] The Court of Appeal had clearly borne in mind the central feature of appellate intervention *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This was reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention *ie*, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This

was consistent with the established "plainly wrong" test. Therefore, there was no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. What the Court of Appeal had done was merely to accentuate the established "plainly wrong" test consistently applied by the appellate courts in this country. (pp 320 f-h & 321 a)

[2] Reading the evidence of those witnesses who were present when the deceased executed his will, there could be no doubt that the deceased, although a very sick man, understood the nature and extent of the properties he was disposing under the will and that he was able to comprehend and appreciate the claims of the beneficiaries he had in mind. Thus, there was no error in the Court of Appeal's observation that there was insufficient judicial appreciation of the evidence by the High Court when the latter came to the conclusion that the will of the deceased was the product of a man so enfeebled by disease and that the disposition of his properties was the result of a delusion. (pp 328 e & 329 b-c)

[3] This court agreed with the Court of Appeal's observations that the witnesses to the execution of the will, DW2 and DW3, were wholly disinterested witnesses who had no good reason to have concocted their story as neither of them had anything to gain from doing so. (p 330 a-c)

[3a] In the circumstances of this case, it was also difficult to disagree with the holding of the Court of Appeal that the High Court had erred in determining the issue of forgery solely, if not substantially, on the basis of the evidence of two handwriting experts, PW4 and PW6, to the exclusion of relevant and direct evidence from DW2 and DW3, who had actually witnessed the execution of the will by the deceased at the material time. (p 332 a-b)

[4] The Court of Appeal did not find it necessary to deal at length with those matters that were alleged to constitute suspicious circumstances since they were more than adequately disposed of as a result of the evidence from both DW2 and DW3. Given the fact that the Court of Appeal had accepted, quite correctly, the veracity of those witnesses, this court found nothing improper or unjustified in the stand taken by it. In any event, upon close consideration and evaluation of the alleged suspicious circumstances, none of them had any substantial merit. (pp 332 c & 334 e)

[5] In respect of issue (v), the Court of Appeal, in reviewing the various conclusions or findings arrived at by the High Court in the context of the material evidence and submissions at the trial, had adopted the eminently sound approach taken by Lord Phillips MR in the English Court of Appeal case of *English v. Emery Reimbold & Strick Ltd*. Hence, there was no merit in the appellants' complaint on this score. (pp 334 h & 335 c)

[6] The Court of Appeal had correctly dealt with the issues raised, both on the points of law and on the facts. There was, therefore, no merit in this appeal. (p 336 e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Rayuan kerana menerima ke dalam probet suatu wasiat yang dikatakan dibuat oleh seorang Gan Puay Chee ('simati'), serta membenarkan antara lain legasi-legasi tertentu kepada anak-anak perempuan simati, perayu-perayu di sini, dan baki pusaka kepada anak-anak lelakinya, responden-responden di sini. Perayu-perayu, yang tidak berpuashati dengan wasiat, telah memfail guaman di Mahkamah Tinggi bagi mengisytiharkan wasiat sebagai tidak sah. Mereka bergantung secara pentingnya kepada dua alasan, iaitu bahawa simati pada waktu material berada dalam keadaan yang amat uzur disebabkan oleh penyakitnya dan kerana itu tidak mempunyai pemikiran yang waras bagi membolehkan beliau mengagih-agihkan harta-hartanya, dan kedua bahawa wasiat tersebut adalah satu penipuan. Mahkamah Tinggi membuat keputusan yang berpihak kepada perayu-perayu; keputusan Mahkamah Tinggi tersebut, namun begitu, telah diakas oleh Mahkamah Rayuan ekoran rayuan oleh responden-responden. Berikutnya perayu-perayu telah merayu.

Perayu-perayu, yang mana rayuan mereka boleh digulungkan di bawah lima tajuk, berhujah: (i) bahawa Mahkamah Rayuan, yang sepatutnya memakai "ujian kesilapan ketara" yang biasa, telah sebaliknya memakai teknik baru camput tangan di peringkat rayuan yang dipanggil "pengamatan kehakiman yang tidak mencukupi terhadap keterangan"; (ii) bahawa simati tidak mempunyai keupayaan berwasiat yang perlu untuk membuat wasiat; (iii) bahawa dapatan Mahkamah Tinggi mengenai penipuan telah ditangani secara salah oleh Mahkamah Rayuan; (iv) bahawa Mahkamah Rayuan memandang remeh terhadap keadaan-keadaan yang mencurigakan yang berbangkit dalam keterangan-keterangan responden di perbicaraan; dan (v) bahawa Mahkamah Rayuan telah memakai apa yang dipanggil sebagai pendekatan "Flannery" oleh kes Inggeris *Flannery lwn. Halifax Estates Agencies Ltd* yang kelihatan telah merumuskan prinsip bahawa ketidakcukupan alasan atau penghakiman oleh hakim bicara yang lemah adalah memadai untuk menjadi alasan rayuan.

Diputuskan (menolak rayuan)

Oleh Steve Shim HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

[1] Mahkamah Rayuan telah dengan jelas mengambil kira ciri-ciri penting berkaitan campur tangan di peringkat rayuan, iaitu bagi menentukan sama ada mahkamah bicara telah mencapai keputusan atau dapatannya dengan betul berasaskan undang-undang dan/atau keterangan yang dibuktikan. Dalam mengambil pendekatan itu, Mahkamah Rayuan berhak untuk memeriksa proses penilaian keterangan oleh mahkamah bicara. Jelas, bahawa ungkapan "pengamatan kehakiman yang tidak mencukupi terhadap keterangan" hanyalah berkaitan dengan proses tersebut. Ini dicerminkan dalam kenyataan semula Mahkamah Rayuan bahawa seseorang hakim yang dikehendaki mengadili sesuatu pertikaian hendaklah membuat keputusannya atas isu fakta dengan menilai, menimbang dan dengan alasan-alasan mencukupi, sama ada menerima ataupun menolak keseluruhan ataupun mana-mana bahagian keterangan yang berada di hadapannya. Mahkamah Rayuan juga telah menekankan prinsip yang menjadi tunggak kepada campur tangan di peringkat rayuan, iaitu bahawa sebarang keputusan yang dicapai oleh mahkamah bicara yang dibuat tanpa penilaian kehakiman keterangan-keterangan berkemungkinan akan diketepikan di peringkat rayuan. Oleh itu, pengataan bahawa Mahkamah Rayuan telah memakai ujian baru bagi campur tangan di peringkat rayuan adalah tidak bermerit. Apa yang dilakukan oleh Mahkamah Rayuan hanyalah untuk menekankan tentang ujian yang jelas salah tetapi sudah lama terpakai dan digunapakai secara konsisten oleh mahkamah-mahkamah rayuan di negara ini.

[2] Membaca keterangan saksi-saksi yang hadir sewaktu simati membuat wasiatnya, jelas bahawa simati, walaupun sedang sakit, memahami sifat dan jumlah harta yang akan beliau agihkan melalui wasiat serta dapat mengerti akan tuntutan-tuntutan waris-waris beliau. Maka itu, Mahkamah Rayuan tidaklah silap apabila menyatakan bahawa terdapat penilaian kehakiman yang tidak mencukupi di pihak Mahkamah Tinggi – yang membuat rumusan bahawa wasiat simati adalah terhasil dari seorang yang amat uzur disebabkan oleh penyakit sekaligus menjadikan pengagihan harta olehnya sebagai terhasil dari suatu khayalan – yang berakibat mahkamah terkemudian tersebut telah mencapai konklusi yang salah mengenai keupayaan simati untuk berwasiat.

[3] Mahkamah ini bersetuju dengan pandangan Mahkamah Rayuan bahawa saksi-saki kepada pembuatan wasiat, DW2 dan DW3, adalah saksi-saksi bebas yang tidak mempunyai alasan untuk menokok tambah keterangan mereka kerana mereka tidak mendapat apa-apa dengan berbuat demikian.

[3a] Dalam keadaan kes ini, adalah juga sukar untuk tidak bersetuju dengan Mahkamah Rayuan dalam dapatannya bahawa Mahkamah Tinggi telah silap apabila membuat keputusan di atas isu penipuan dengan semata-mata, atau secara substantifnya, berdasarkan keterangan pakar tulisan, PW4 dan PW6, dengan mengetepikan keterangan-keterangan relevan dan terus oleh DW2 dan DW3 yang melihat sendiri pembuatan wasiat oleh simati pada waktu material.

[4] Mahkamah Rayuan mendapati tidak perlu untuk menyentuh dengan panjang lebar hal-hal yang dikatakan sebagai suasana-suasana yang mencurigakan oleh kerana mereka sudah boleh berpuas hati dengan keterangan-keterangan DW2 dan DW3. Memandangkan bahawa Mahkamah Rayuan telah pun menerima, dan menerima dengan betulnya, kesahihan keterangan saksi-saksi tersebut, mahkamah ini berpendapat tidak ada salahnya pendirian Mahkamah Rayuan tersebut. Apapun, meneliti dan menilai suasana-suasana yang dikatakan mencurigakan itu, tiada satu pun darinya mempunyai merit kukuh.

[5] Berkaitan dengan (v), Mahkamah Rayuan, dalam mengkaji semula konklusi-konklusi dan rumusan-rumusan yang dicapai oleh Mahkamah Tinggi dalam konteks keterangan material dan hujah-hujah penggulungan di perbicaraan, telah menggunapakai pendekatan yang betul seperti yang diambil oleh Lord Phillips MR dalam kes Mahkamah Rayuan Inggeris *English lwn. Emery Reimbold & Strick Ltd*. Bantahan perayu-perayu berkaitan perkara ini, dengan itu, tidak bermerit.

[6] Mahkamah Rayuan telah menangani isu-isu yang timbul dengan betul, sama ada dari segi undang-undang mahupun fakta. Dengan itu tiada merit dalam rayuan di sini.

Case(s) referred to:

Armagas Ltd v. Mundogas SA ("The Ocean Frost") [1985] 1 L1 R 1 ***(refd)***
Banks v. Goodfellow [1870] LR 5 QB 549 ***(refd)***
Battan Singh & Ors v. Amirchand & Ors [1948] AC 61 ***(refd)***
Billinghurst v. Vickers [1810] ER 956 ***(refd)***
Choo Ah Pat v. Chow Yee Wah [1974] 1 MLJ 62 ***(refd)***
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 2 MLJ 165 ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
English v. Emery Reimbold & Strick Ltd [2002] 3 All ER 385 ***(foll)***

Flannery v. Halifax Estates Agencies Ltd [2000] 1 WLR 377 ***(refd)***
Kameswara Rao v. Suryaprakasarao AIR [1962] AP 178 ***(refd)***
Mahendran v. Arumuganathan [1999] 2 SLR 579 ***(refd)***
Muniandy & Ors v. PP [1966] 1 MLJ 257 ***(refd)***
Muthusamy v. Ang Nam Cheow [1979] 2 MLJ 271 ***(dist)***
Newton v. Ricketts [1861] 11 ER 731 ***(refd)***
Owners of Steamship Hontestroom v. Owners of Steamship Sagaporack [1927] AC 37 ***(refd)***
Powell & Wife v. Streamtham Manor Nursing Home [1935] AC 243 ***(refd)***
Rex v. Low Toh Cheng [1941] MLJ 1 ***(refd)***
State of Rajasthan v. Hanuman (AIR) [2001] SC 282 ***(refd)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 30 MLJ 87 ***(dist)***
Tek Chand v. Dile Ram AIR [2001] SC 905 ***(refd)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***
Watt or Thomas v. Thomas [1947] AC 484 ***(refd)***
William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors [1924] 34 CLR 558 ***(foll)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yahaya Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 ***(dist)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

For the appellants - CV Das (Goh Siu Lin & Brian Jit Singh); M/s Shook Lin & Bok
For the respondents - Cecil Abraham (Tommy Thomas, Robert Lazar, Gopal Sreenevasan & Mark Lau) M/s Sivananthan

Reported by Suresh Nathan

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

The Issues

The Federal Court had, on 28 July 2003, granted the appellants leave to appeal on 29 questions. In their memorandum of appeal, the appellants have converted these questions into 29 grounds of appeal. Before us, the appellants' counsel has categorised these grounds under 5 specific heads as follows:

(1) The appellate intervention question.

(2) The testamentary capacity question.

(3) The forgery question.

(4) The suspicious circumstances question.

(5) The so-called "Flannery" question.

Counsel on both sides of the divide have focused their submissions under those heads. That makes perfect sense because this appeal can be effectively disposed of on consideration of the issues raised under those specific heads.

The Factual Background

The factual background can be restated briefly. The deceased Gan Puay Chee @ Gan Chuan Lian migrated to this country from China at the tender age of 9. He settled down in Malacca. There he became a very successful businessman. He made his fortune in the agricultural sector. He owned rubber and oil palm estates. He also owned substantial properties, both moveable and immoveable, in Singapore and England. He built up his business empire single-handedly, conducting his affairs through private limited companies, partnerships and sole proprietorships. He kept a low profile eschewing publicity. He was a very dominant personality, much in the traditional Chinese style patriarch. His business and family affairs were apparently structured quite like the hierarchical feudal system with him at the apex. He was said to be extremely frugal and tight-fisted with money. He was however a simple man with simple taste, often wearing a singlet and sarong. His wife Ong Kiau passed away in 1985. They had 5 natural children, namely, Gan Kim Toon, Gan Yook Chin, Gan Yook Hwa, Gan Kim Guan and Gan Yoke Mua. The youngest child Gan Sieow Lea was given away by her parents when she was six months old. The deceased and his wife adopted three children, namely, Gan Yan Khean, Lim Lye Huat and Tay Heok Lee. They lived initially at No. 130, Jalan Tun Tan Cheng Lock, Malacca, but in 1972, moved to No. 82, on the same road. In 1993, the deceased suffered a fall. He then had to use a wheel chair. He was taken care of on a daily basis by one Lee Kim Teng who would exercise him and attend to his bathing and toilet needs. After the fall, the deceased seldom attended his office. Instead, he would carry out his business affairs from the family home. He would make decisions there and the staff would visit him at the home. In December 1996, the deceased wanted to make a will. He conveyed this intention to his solicitor Andrew Goh. In fact, an appointment was made by Andrew Goh to visit the deceased for the purpose but the visit did not take place as Andrew Goh had apparently forgotten about the appointment. A few days before Chinese New year 1997, the deceased was said to have dictated in Hokkien to his second son Gan Kim Guan certain names and percentages which were then written down by the latter in two pieces of paper. These were produced at the trial as exhs. D3A and D3B. Subsequently in April 1997, while

the deceased was in hospital, Dr. Goh Tiong Peng, the family physician, at the request of some members of the deceased's family, asked him "whether there were any loose ends that he had not tied up." According to Dr. Goh, the deceased replied in the affirmative. It was about this time that the deceased became seriously sick. He was taken to Gleneagles Hospital in Singapore where he was diagnosed to be suffering from advanced mid-oesophageal carcinoma (a form of cancer). It was terminal. On 8 April 1997, the deceased was admitted to the Ayer Keroh Specialist Centre, Malacca, where he was put under the care of Dr. Goh. He was discharged from that hospital on 11 April 1997, but was re-admitted on 25 April 1997. There he remained until he passed away on 1st May 1997. A few days after his death, a will surfaced. The will was purportedly made by the deceased on 16th April 1997. The will which granted inter alia specific legacies to the daughters (the appellants) and the residual estate to his sons (respondents 2, 3 and 4). The daughters were unhappy with the will. They disputed its validity. They brought an action to declare it invalid. They relied essentially on 2 grounds ie, (1) that the deceased was at the material time so enfeebled by illness as to be incapable of having a sound disposing mind and (2) that the will was a forgery.

After a lengthy hearing, the High Court found in favour of the appellants. The respondents appealed to the Court of Appeal. The Court of Appeal reversed the High Court decision and ordered the will to be admitted to probate. As we said, the appellants sought leave of the Federal Court to appeal. This was granted.

The Appellate Intervention Question

Here, counsel for the appellants submitted that the Court of Appeal applied a new technique of appellate intervention called "insufficient judicial appreciation of the evidence." He drew attention to para. 27 of the judgment which in part stated:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence …

Counsel contended that the test adopted by the Court of Appeal was quite different from the established plainly wrong test. According to him, the established test merely required the court to look at the substance of the judgment as a whole to see if it was wrong and not a minute examination of the evidence of all the witnesses. He cited *Owners of Steamship Hontestroom v. Owners of Steamship Sagaporack* [1927] AC 37, in particular the following passage from the speech of Lord Summer at p. 47:

> What then is the real effect of the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: ... None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, ... If his estimate of the man forms any substantial part of his reasons for his judgment, the trial judge's conclusions of fact should, as I understand the decisions, be let alone … We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

Counsel also cited in support the sentiments expressed by Viscount Sankey LC in *Powell & Wife v. Streamtham Manor Nursing Home* [1935] AC 243 who said this:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a re-seeing Court …
>
> On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence, the Court of Appeal will have special regard to the fact that the judge saw the witnesses … In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question – Am I who sit here without those advantages sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them, was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Counsel then went on to state that an exception to the rule of non-intervention by the appellate court was where the conclusions or findings of the court below would fly in the face of witness evidence and that no good reasons had been adduced for rejecting it. He cited the case of *Watt or Thomas v. Thomas* [1947] AC 484 making specific reference to that part of the judgment of Lord Thankerton who said:

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court.

And in agreeing with Lord Thankerton, Lord Macmillan observed as follows:

> The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.

It was counsel's contention the all the established principles of appellate intervention recognized 2 qualifications: (a) inferences drawn from primary facts were to be distinguished from the primary facts and (b) where credibility of witnesses were involved. He argued that the new test enunciated by the Court of Appeal in this case offended the narrow principles on which the Court of Appeal would interfere where findings were based on credibility of witnesses. He further submitted that the new test did not recognize the limitation in a situation where a trial judge concluded that a witness was plainly lying or untruthful, an appellate court would almost never reverse citing in support the Privy Council cases of *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd* [1964] 30 MLJ 87, *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117 and *Muthusamy v. Ang Nam Cheow* [1979] 2 MLJ 271. Tay Kheng Hong concerned a contract case whereas *Yahya* and *Muthusamy* were motor accident cases. On the facts, these cases are clearly distinguishable from the present case. On that basis, they can be of little assistance here.

In gist, the pivotal question raised by the appellants was whether the term "insufficient judicial appreciation of the evidence" used by the Court of Appeal constituted a new test for appellate intervention. We think it is important to examine this proposition in the light of what the Court of Appeal had said in its judgment beginning from para. 27 which we have reproduced earlier but repeated herein for the purpose of emphasis. It states:

> … Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

And the Court of Appeal went on to explain in para. 28 as follows:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. … He must also test the evidence of a particular witness against the probabilities of the case.

In making the observations above, the Court of Appeal cited the following cases: *Tindok Besar Estate Sdn Bhd v. Tinjar Co*. [1979] 2 MLJ 229; *Muniandy & Ors. v. Public Prosecutor* [1966] 1 MLJ 257; *Dr. Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153, *Yusoff bin Kassim v. Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; *Rex v. Low Toh Cheng* [1941] MLJ 1; *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110; *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 2 MLJ 165; *Armagas Ltd v. Mundogas SA ("The Ocean Frost")* [1985] 1 L1 R 1; *State of Rajasthan v. Hanuman* (AIR) [2001] SC 282, 284; *Tek Chand v. Dile Ram* (AIR) [2001] SC 905.

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

The Testamentary Capacity Question

It is trite law that for a will to be valid, a testator must have testamentary capacity. Whether a testator has testamentary capacity depends on the facts of each case. What is meant by testamentary capacity has been laid down by Chief Justice Cockburn more than a century ago in *Banks v. Goodfellow* [1870] LR 5 QB 549. This case was cited copiously by the Court of Appeal in the instant case. For the sake of emphasis it is appropriate to repeat the sentiments expressed by Cockburn CJ who said *inter alia*:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. … In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; …

Given such sentiments, counsel for the appellants submitted that the Court of Appeal proceeded to make the unusual proposition that only mental disorder or insane delusion could vitiate a will. This is quite incorrect. What the Court of Appeal actually said is this: "What the law primarily looks for as vitiating testamentary capacity is mental disorder or insane delusion." We should emphasise on the word "primarily". In any event, that proposition must have been stated in the context of the sentiments or observations expressed by Cockburn CJ in *Banks v. Goodfellow*. There is no flaw in the Court of Appeal's proposition.

The Court of Appeal held that the time for determining the mental capacity of the testator who made the will was the time when the will was executed. The Court cited various authorities including *Billinghurst v. Vickers* [1810] ER 956; *Choo Ah Pat v. Chow Yee Wah* [1974] 1 MLJ 62; *Mahendran v. Arumuganathan* [1999] 2 SLR 579. *Theobald on Wills* (15th edn) was also

relied on, in particular at p. 32 which stated that "the testator must have testamentary capacity at the time he executes the will." *Banks v. Goodfellow* was cited as a footnote. In our view, that is the correct statement of the law.

As regards the burden of proof, the Court of Appeal quite rightly stated the settled law ie, that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in *William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors* [1924] 34 CLR 558 to be instructive. Therein Isaacs J said *inter alia*:

> (1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged, the court is bound to pronounce against the instrument.
>
> (2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence.
>
> (3) The proponent's duty is, in the first place, discharged by establishing a *prima facie* case.
>
> (4) A *prima facie* case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the Court judicially that the will propounded is the last will of a free and capable testator.
>
> (5) A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments.
>
> (6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the Court varies with the circumstances.
>
> (7) As instances of such material circumstances may be mentioned (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit.

(8) Once the proponent establishes a *prima facie* case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the onus probandi lies upon the party impeaching the will to show that it ought not to be admitted to proof.

(9) To displace a *prima facie* case of capacity and due execution, mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing his property.

(10) The opinion of witnesses as to the testamentary capacity of an alleged testator is usually for various reasons of little weight on the direct issue.

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions.

Given the observations cited above, we turn next to their application to the facts and evidence in the present case. In this regard, both the High Court and the Court of Appeal had examined the evidence of two defence witnesses – Teoh Ming (DW2) and Chan Fong Lin (DW3). According to Teoh Ming (a lawyer), she was brought by Lee Teck Seng to see the deceased at his house on 16 April 1997 as the deceased had earlier indicated to Lee that he wanted to make a will. Lee was known to the deceased for many years. He was said to be a fish wholesaler who also had interests in the hotel and property business. He was also active in numerous Chinese associations in Malacca. At the house, Teoh Ming was introduced by Lee to the deceased. At the time the deceased's eldest son Gan Kim Toon was also present but he was requested by the deceased to leave them alone. Teoh Ming then asked the deceased whether he wished to make a will to which he replied in the affirmative. The deceased then handed to Teoh Ming 2 pieces of paper (exhs. D3A and D3B) which apparently contained the names of the beneficiaries and their allotted shares under the will. Teoh testified that she noticed that the percentages stated therein added up to 120% and so she inquired from the deceased whether it should not be 100% instead. The deceased replied that it should have been 100% and requested Teoh to amend it accordingly. She therefore amended the percentage to read as follows: 40% to Gan Kim Toon; 40% to Gan Kim Guan and 20% to Gan Yan Khern. The bequests to the other beneficiaries remained the same. Teoh said she then read the contents as amended in exhs. D3A and D3B to the deceased including the names of the beneficiaries. The deceased confirmed the contents read out to him. He also identified others who were not

beneficiaries. The deceased then asked Lee Teck Seng who was present whether he agreed to be the executor of the will and he agreed. Teoh asked the deceased when he would like to sign the will and he replied that he wanted to do so on the same day if possible. Teoh explained that she would have to go back to her office to prepare the will and would return in the afternoon. On returning to her office, Teoh instructed her clerk Chan Fong Lin (DW3) to draft out the will in accordance with the contents in exhs. D3A and D3B. Eventually, with the assistance of Teoh, Chan managed to produce the required draft of the will. At about 2.30pm the same day, Teoh and Chan proceeded to the deceased's house. Teoh introduced Chan to the deceased. Thereafter, Teoh took out the will, opened it and read out the contents in Hokkien to the deceased. Teoh also explained the contents of the will to the deceased and asked him whether it was in accordance with his instructions and whether that was how he wanted his properties to be distributed. On all counts, the deceased replied in the affirmative. Teoh then handed both copies of the will to the deceased for his signature. The deceased signed the copies in her presence. Chan was also present at the time, so was Lee Teck Seng. Thereafter, both Teoh and Chan signed as attesting witnesses. After the deceased had executed the will, Teoh informed him that she would have to take the will to her office for sealing purposes. Before Teoh departed, the deceased told her to hand over the original sealed copy of the will to Lee Teck Seng for safe custody. In Teoh's office, the will was then sealed. Several days later, Lee Teck Seng went to Teoh's office and collected the original sealed copy of the deceased's will after paying fees amounting to RM575. Lee kept the will in his house safe until 11 May 1997, when he read out the will in the presence of the beneficiaries.

Now, reading the judgment of the High Court, it seems clear that it found Teoh Ming to be wanting as a witness essentially because there was no challenge or rebuttal to the evidence led by the second plaintiff (PW9) and that of her husband PW3 who alleged that at the reading of the will on 11 May 1997 when Teoh was asked about the execution of the will, she merely said that she had prepared the will and not that she had witnessed it. This can be reflected in the following passages of the judgment:-

> The evidence of PW3 and PW9 with regard to what occurred on 11.5.97 between DW2 and PW3 was not challenged at all by the Defendants. 'Their corroborative evidence stands unchallenged and unrebutted,' said the Plaintiff's counsel.
>
> I find that DW2 as a lawyer did not truthfully and clearly answer questions posed by the Plaintiffs' counsel although to my mind these questions are questions that are vital to the validity of the will whereby the issue is whether it contravenes the requirements of Section 5(2) of the Wills Act, 1959 on there being 2 witnesses to a will.

The Court of Appeal rejected the High Court's finding that there was no challenge or rebuttal to the evidence of PW3 and PW9. In this regard, the Court of Appeal drew attention to the cross-examination of PW3 by Mr. Robert Lazar, counsel for the defendants which clearly indicated that the relevant part of the defence was indeed put to PW3. Having put to PW3, the Court of Appeal took the position, relying on the authority of *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212, that it was unnecessary to put the same questions to PW9. We tend to agree with the observation. In our view, the court was right in rejecting the High Court's finding for the reasons stated.

The other essential feature relied upon by the High Court related to a letter dated 18 July 1997 from the firm of Teoh (DW2) made in reply to plaintiffs' solicitor's letter dated 11 July 1997 mentioning certain exchanges alleged to have taken place between PW3 and DW2 at the reading of the will on 11 May 1997. It is unnecessary for us to deal at length on this. Suffice to say that we agree with the Court of Appeal's sentiments expressed in para. 77 of the judgment which states:

> It is the phrase to which we have lent emphasis that appears to have been the source of confusion in the court below and which led the commissioner into error. From the evidence on record, it is clear that, in essence, learned counsel for the plaintiffs, with complete propriety, suggested to DW2 during the latter's cross examination that what the witness was prevaricating when she used the phrase 'does not recall' … As may be seen from the comment of the learned judicial commissioner presently under discussion, DW2's response to questions under cross examination made an impression – a negative impression – on his mind about the veracity of DW2.
>
> ... it was the duty of the learned judicial commissioner not merely to focus on the answers given in cross examination but also to hearken to the contents of the whole of the letter and to properly interpret so much of DW2's response in that letter that came under challenge in the course of cross examination. The learned judicial commissioner, with respect, failed to do this and thereby fell into serious error in his appreciation of DW2's evidence.
>
> … if the learned judicial commissioner paid sufficient heed to the other paragraphs of the letter in question, he would have realised that there was indeed no prevarication at all on the part of DW2. For, twice in that letter she made it clear beyond any doubt that the deceased signed his will in her presence and that she did in fact attest that will. Further, the learned judicial commissioner did not judicially appreciate DW2's evidence by testing her answers given under cross examination against the rest of her evidence and against the probabilities of the case. Had he done so he would have found that there was no concession by DW2 in paragraph 2 of her letter …

> When properly viewed, the gist of DW2's evidence is that at the time she made her written response she had no recollection of any such question as alleged by PW3 having been asked of her. Now, that is very different from saying that she had doubts about having given the alleged answer to PW3. Yet this important – indeed crucial – difference went unnoticed by the learned judicial commissioner.
>
> … when viewed objectively, the proper interpretation that the learned judicial commissioner ought to have placed upon DW2's evidence (in particular with reference to the paragraph under challenge in her letter) is that as far as she could recall such a question as alleged by PW3 had never been asked of her. Any other interpretation of her letter would run against what had been stated in the other paragraphs of her letter and against the probabilities of the case.

On the alleged prevarication on the part of Teoh (DW2) concerning whether at the time of reading the will, DW2 had told Mr. Ong (PW3) on being asked by the latter, that Chan (DW3) was the only witness to the will, counsel for the appellants submitted that it was inconceivable that DW2 could be certain about the matter at the trial when she was uncertain about it at a point nearer in time to the incident. It seems that the High Court took the same position. In our view, there was nothing unusual in DW2's behaviour. It was an acceptable human frailty. To hold this against DW2, as the High Court had done, would be quite unreasonable under the circumstances. That being the position, we tend to agree with the Court of Appeal that the High Court had erred in holding out DW2 as an untruthful witness. In our view, the High Court had failed to adequately consider all the relevant evidence and/or draw the proper inferences having regard to the probabilities of the case.

Another significant feature relied on by counsel for the appellants in contending that the respondents (as propounders of the will) had not established satisfactorily the testamentary capacity of the deceased relates to the medical evidence adduced. In this connection, the High Court dealt with the issue under the heading of "Sound Disposing Mind". Here the High Court reviewed the medical evidence of Dr. Goh (DW1) as well as that of Dr. Ganesan (PW7). In assessing their evidence, the High Court cited a number of case authorities including *Battan Singh & Ors. v. Amirchand & Ors* [1948] AC 61 and finally came to this conclusion:

> I agree with what was stated by the Privy Council in *Battan Singh* case at page 172, last paragraph '… the will is the product of a man so enfeebled by disease as to be without sound mind or memory at the time of the execution and that the disposition of his property under it was the outcome of delusion … the will is therefore invalid.

There was some dispute before the Court of Appeal as to whether this conclusion by the High Court constituted a finding of fact as regards the testamentary capacity of the deceased. For the respondents, it was submitted that the High Court did not make a specific finding that the deceased was of unsound mind or that he was so enfeebled by disease as to be without sound mind or memory. According to counsel, the conclusion by the High Court cited above was merely a restatement of the proposition of law in *Battan Singh* and nothing more. In rebuttal, counsel for the appellants contended that the High Court had adopted or intended to adopt the words in Battan Singh as its own in coming to a specific finding of fact. On this issue, the Court of Appeal had this to say:

> We agree with counsel that the foregoing passage (whether in Bahasa Malaysia or its English translation) does not constitute a clear or specific finding of a lack of testamentary capacity on the part of the deceased. That said, however, we are prepared to accept the foregoing passage in the judgment may be interpreted as containing a finding by the learned judicial commissioner that the deceased was so enfeebled by disease as to be without sound mind or memory at the time he executed the will. The issue here is whether he was right in making that finding.

We find no flaw in the view expressed by the Court of Appeal above. The Court of Appeal was prepared, quite rightly, to accept that the conclusion of the High Court could be interpreted as a finding on the deceased's lack of testamentary capacity at the time of execution of the will. On that basis, the Court of Appeal proceeded to consider whether or not the High Court was right in its finding having regard to the medical evidence as well as other evidence adduced in the High Court. It took the view that there was no such evidence to show that the deceased lacked the necessary testamentary capacity. This is reflected in paras. 54 and 58 of the judgment which state:

> 54. In February 19987 the deceased was diagnosed with cancer of the mid-oesophagus. It was non-operable. And it was of an aggressive nature. The physical health of the deceased took a turn for the worse. He was in and out of hospital from March 1997 until his demise. But his mind was certainly lucid. That much is clear from the evidence of his personal physician, DW1, who testified that he did not at any one time before the deceased's death fail to have a meaningful conversation with the deceased. Neither did the deceased give any irrational answers to DW1 during the month of April 1997. In fact no witness testified positively that the deceased lacked the requisite mental capacity to make a will at the time the will was made on April 16, 1997. On the contrary, as will be seen, all the available evidence at trial was to the opposite effect.

> 58. As we have said earlier, there was not a shred of evidence to show that the deceased lacked the mental capacity to make a will. We have had the evidence of the relevant witnesses (in particular DW1) on the point read to us several times during argument. There is not a shred of evidence, medical or otherwise, to show that the deceased lacked mental capacity on April 16, 1997.

In the result, the Court of Appeal took the position that the conclusion arrived at by the High Court as regards the mental state of the deceased both as to its nature and as to the time of its alleged existence to be plainly wrong, thereby constituting a serious misdirection that had occasioned a miscarriage of justice. Here, counsel for the appellants argued that the Court of Appeal, in the paragraphs cited above, had erred in suggesting that the burden of proof was on the appellants (as challengers of the will) to establish lack of testamentary capacity on 16 April 1997. We think this is a misconception. The Court of Appeal merely examined the position taken by the High Court as to the mental state of the deceased at the time of execution of the will. Clearly, the views expressed by the Court of Appeal in paras. 54 and 58 do not suggest a shift in the burden of proof required by the propounders of the will on the issue of testamentary capacity.

As we have stated earlier, the High Court came to the conclusion that the will of the deceased was the product of a man so enfeebled by disease and that the disposition of his properties under the will was the result of a delusion. In this connection, the appellants seem to have latched on to the medical evidence of Dr. Goh (DW1) and Dr. Ganesan (PW7) as establishing the probability that the deceased could be suffering from irrational thinking and hallucination at the time the will was executed. In coming to this conclusion, the High Court relied significantly on that part of the evidence of Dr. Goh when he said:

> When a person is weak, frail and anaemic like the deceased, there may be times when he cannot make a rational judgment. When a patient is suffering from diabetes, advanced cancer, loss of blood, it is possible that such a patient can suffer from impairment of rational thinking. Such a person can also lapse into confusion. Medically, the condition of such a patient will be unpredictable. There will be ups and downs. This unpredictability can alternate between a period of rational and irrational thinking. The change can happen within a day.
>
> Between the 9th of April and 1st May, if I was told that the deceased was hallucinating, it would not surprise me.

In our view, the use of those terms by Dr. Goh such as confusion, irrational thinking and hallucination must be examined in the light of the evidence of Teoh Ming (DW2) and Chan Fong Lin (DW3) who were present when the deceased executed his will. Reading the evidence of these witnesses including that of Lee Teck Seng (the executor of the will), there can be no doubt that the deceased, although a very sick man, understood the nature and extent of the properties he was disposing under the will and that he was able to comprehend and appreciate the claims of the beneficiaries he had in mind. It seems clear that the guidelines enunciated by Cockburn CJ in *Banks v. Goodfellow (supra)* have been adequately complied with in this case. As observed by the Court of Appeal, with which we agree, there was insufficient judicial appreciation of the evidence by the High Court which had resulted in an erroneous conclusion concerning the testamentary capacity of the deceased. There is no error in that observation.

The Forgery Question

This question also relates to the issue of due execution of the will of the deceased. On this, the Court of Appeal said as follows:

> We now turn to consider the issue as to whether there was due execution of the will by the deceased. The learned judicial commissioner found against the defendants on this point on two main grounds. First, he found that the signature on the will was not the deceased's and therefore a forgery. Second, he found that there had been only one attesting witness present when execution took place and that therefore there was non-compliance with the relevant provisions of the Wills Act.

The Court of Appeal then reviewed in some detail the evidence on this issue of due execution. This is reflected in paras. 62 to 80 of the judgment. The Court of Appeal took the view that the High Court had failed to consider the element of motive on the part of Teoh Ming (DW2) and Chan Fong Lin (DW3) in respect of the execution of the deceased's will; that it did not ask the question as to what possible motive these two witnesses would have in concocting such a story as they took no interest under the will nor was DW2 paid any significant amount for the preparation of the said will.

Here, counsel for the appellants questioned the soundness of the proposition or observation, contending that DW2 was attempting to cover her mistakes as a result of her inexperience ie, young, foolish and too trusting. With respect, we do not accept this. Quite clearly, the evidence shows that DW2 had been in legal practice for about seven years at the material time. She was obviously not a novice. In any event, even accepting her inexperience, given the factual circumstances in this case, it is unlikely, in our view, that DW2 would have

taken such an enormous risk to her professional career. Moreover, it is a matter of professional morality and so its standard should not be measured by the length of one's practice. Everything considered, we tend to agree with the observations expressed by the Court of Appeal in the following terms:

> Once the evidence of DW2 and DW3 is carefully scrutinized and tested against the probabilities of the case, it is apparent that they are wholly disinterested witnesses. Their evidence may be safely acted upon and ought to have been acted upon by the learned judicial commissioner. DW2 attended on the deceased, took his instructions, prepared a will in accordance with those instructions and attended to the execution and attestation of that will. DW2 and DW3, testified that the deceased was entirely lucid and mentally alert both at the time of giving instructions and at the time of signing the will. We find no good reason for these two witnesses to have concocted their story as neither of them had anything to gain from doing so.

The Court of Appeal then dealt with the High Court's finding of forgery as regards the alleged signature of the deceased on the will. Here, counsel for the appellants contended that the Court of Appeal committed a fundamental error in holding that "direct evidence inevitably prevails over handwriting expert's opinion which should therefore be discounted." He argued that that approach was wrong and the reliance by the Court of Appeal on the English case of *Newton v. Ricketts* [1861] 11 ER 731 was misplaced because in that case there was no challenge to the direct evidence which was deemed to have been accepted (see paras. 58 and 59 of his written submission). He further contended that a court had to have regard to all the evidence before concluding on the genuineness of a signature, drawing attention to *Dr. Shanmuganathan v. Periasamy* [1997] 2 CLJ 153. Counsel made reference to para. 109 of the Court of Appeal's judgment which states:

> We consider it to be a well established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, then it is a safe course for a court to prefer the direct evidence.

Again, the Court of Appeal cited *Newton v. Ricketts (supra)*. It is perhaps pertinent to note that the Court of Appeal also drew support from the Indian case of *Kameswara Rao v. Suryaprakasarao* (AIR) [1962] AP 178 in particular the following passage of the judgment therein:

> The opinion of a handwriting expert is, no doubt, admissible under s. 45 (Evidence Act). What value is to be attached to that opinion in a given case is however, entirely a different matter. An expert's opinion with respect to handwriting must always be received with great caution. There certainly may be, and perhaps are cases where the handwriting expert's opinion may be of assistance to the Court in coming to a conclusion as to the genuineness of disputed handwriting. But the art of forming opinion by comparison of handwriting is essentially empirical in character and error is seldom inseparable from such opinions. *Where however, there is direct and trustworthy evidence of persons who had actually seen the signing of the document by the testatrix, it is not necessary to refer to or rely on the expert opinion.*

In emphasizing the part underscored above, the Court of Appeal took the view that the High Court had erred in unreasonably rejecting the evidence of two attesting witnesses DW2 and DW3 who had actually witnessed the execution of the will by the deceased. The court obviously regarded them as direct and trustworthy witnesses. Moreover, when the statement of the court cited above is examined in the context of the observations made in *Kameswara Rao* no flaw can be attributed to that statement.

Still on the issue of forgery, the Court of Appeal questioned the soundness of the High Court's conclusion expressed as follows:

> In this case, I hold that the deceased's signature in what was alleged to be the deceased's will was not the signature of the deceased. I accept the reasons given by PW4 and PW6. To me, a good way of countering the evidence from these expert witnesses is to bring another expert witness who is able to give an opposing opinion and the Defendants' failure to bring their own expert witness was prejudicial to the Defendants' case.

On this score, the Court of Appeal reiterated that when the forgery comment was to be read in the context of the whole judgment, it would lead to the inescapable conclusion that the High Court was attempting to displace the evidence of one set of experts with another. The Court of Appeal held that the High Court fell into serious error for adopting such an over-simplistic approach to the evaluation of the totality of the evidence. In rebuttal, counsel for the appellants submitted the High Court's finding of forgery was based on the reports of the handwriting experts and from the direct evidence adduced. Such direct evidence referred to by the counsel must necessarily relate to what the High Court reiterated as "the evidence of all witnesses as to the deceased's soundness of mind and his character." The High Court did not unfortunately explain the relevance of such evidence on the issue of forgery. In the absence of any explanation, there is, in our view, very little merit in the observation. However, the High Court did elaborate extensively on the evidence and reports

of the two handwriting experts PW4 and PW6. In the circumstances, it is difficult to disagree with the observation of the Court of Appeal that the High Court had erred in determining the issue of forgery solely, if not substantially, on the basis of the evidence of the two handwriting experts PW4 and PW6 to the exclusion of relevant and direct evidence from the two witnesses Teoh Ming (DW2) and Chan Fong Lin (DW3) who had actually witnessed the execution of the will by the deceased at the material time.

The Suspicious Circumstances Question

In this connection, counsel for the appellants submitted that the Court of Appeal had treated dismissively the various suspicious circumstances in the evidence adduced by the respondents at trial. It is, we think, fair to state that the Court of Appeal did not deal at length, those matters which were alleged to constitute suspicious circumstances. The court felt it was unnecessary since all the alleged suspicious circumstances were more than adequately disposed of as a result of the evidence from both DW2 and DW3. It went on to hold that once the evidence of DW2, DW3 and DW12 was accepted, as it did, that would be sufficient to dispel all the alleged suspicious circumstances. Given the fact that the Court of Appeal had accepted, quite correctly we think, the veracity of those witnesses, we find nothing improper or unjustified in the stand taken by it.

In any event, what were these alleged suspicious circumstances? We find it sufficient to highlight the significant ones. First, attention can be drawn to that part of the judgment of the High Court which states:

> The character of the deceased to me is important. The witnesses agree that the deceased was stingy, private and did not trust others easily. DW1 in his evidence said that he would be surprised if the deceased had asked a person with whom he had no prior dealings to prepare important documents namely wills. D4 also said the deceased had set ways of doing things.

In the result, counsel for the appellants argued that the deceased, given his peculiar character, was unlikely to have requested DW2, a total stranger, to prepare his will at the material time. Here, the evidence shows that DW2 was introduced to the deceased by Lee Teck Seng. The deceased knew Lee well. Lee was a close friend of the deceased's eldest son for many years. He was said to be very active in numerous Chinese associations in Malacca and as a result, was awarded a title by the Governor of Malacca. He was a fish wholesaler and had interests in the hotel and property business. So clearly, he was quite a prominent member of the society in Malacca. In the circumstances, it was hardly surprising that the deceased should have appointed Lee as the executor and trustee of his will and to have readily accepted Lee's recommendation of DW2 as a lawyer in preparing his will for execution.

Secondly, the following passage in the judgment of the High Court bears examination. It states:

> The deceased was said to be very careful with his documents. But the original copies of D3A and D3B as well as the exercise book could not be found. This to me is contrary to the deceased's character who was very meticulous with his documents.

Let us say that even very careful people sometimes make mistakes. No one is infallible. Here, it is not disputed that the deceased was physically handicapped due to his sickness and he had to rely on a professional helper to move around the house. As regards documents, he had relied on his daughter-in-law (the wife of his eldest son) to keep them safe. He himself did not keep the keys to the safe. He had placed them in the custody of his daughter-in-law. Under those circumstances, it is not difficult to foresee a situation where he could lose or misplace the documents such as exhs. D3A and D3B. Thus, to state, as the High Court had done, that due to the character of the deceased, he was unlikely to have misplaced the documents exhs. D3A and D3B is perhaps stretching the supposition too far.

Thirdly, the High Court had invoked the provisions of s. 114(g) of the Evidence Act 1950, against D2 the eldest son of the deceased who was not called as a witness although he was alleged to have been present at the time Lee Teck Seng (D1) brought Teoh Ming (DW2) and Chan Fong Lin (DW3) to the deceased's house for the purpose of executing the will. The High Court appeared to take the position that D2 should have given evidence to support the defendants' contention that the deceased executed his will on 16 April 1997. There was no dispute that D2 was one of the main beneficiaries of the deceased's will. He would therefore have been an interested witness. As such, his evidence, from a corroborative standpoint, would have been quite insignificant. His evidence would have little weight. In the circumstances, it was not improper for the respondents not to have called D2 as a witness.

Fourthly, another suspicious factor which the High Court took into account was the incident concerning the deceased's handing over his identity card to Lee Teck Seng at the hospital on 10 April 1997 and subsequently at the house on 16 April 1997. The following passage in the judgment reflects this:

> I am highly suspicious of the events which occurred on 10.4.97 and 16.4.97.
>
> I am of the view that there is no possibility that the deceased was able to take his identity card from the drawer when there was a drip and blood transfusion on 10.4.97. I also did not believe the evidence of D1 in this matter when the hospital record and D5 stated that on 10.4.97 at 8.00 a.m. and 9.00 a.m. the deceased was receiving a blood transfusion.

Now, the undisputed evidence shows that the deceased could still move around in his wheel chair with the help of his professional helper Lee Kim Teng (D5) who looked after his daily needs. According to Lee (D5), the wheelchair was constructed in such a way that blood transfusion and saline drip could take place while the deceased was moved around. This would mean that the deceased was not totally handicapped physically as to be unable to open a drawer, retrieve his identity card and then hand it over to Lee Teck Seng (D1). It is not an inconceivable feat as the High Court seemed to believe.

Fifthly, the High Court questioned the unlikely behaviour of Lee Teck Seng (D1) in not informing the eldest son of the deceased about the execution of the will on 16 April 1997 as they were good friends. This is reflected in the following passage of the judgment:

> On 16.4.97, D1 and D2 entered together into house no. 82. D2 was said to have opened the door. As a good friend, it was unlikely for D1 not to inform his good friend D2 that the deceased wanted to execute a will on 16.4.97.

We do not see the merit in this observation. After all, the very nature of a will is its confidentiality. It is not normal practice for anyone executing a will to disclose its existence to the beneficiaries before the appointed time. Further more, anyone appointed executor of a will holds a position of trust and confidence and he is unlikely to disclose that fact to anyone else – least of all, to the beneficiaries before the death of the testator. In this case, it was perfectly in keeping with that practice that D1 did not disclose to D2 about the execution of the will, even though they might have been good friends. Nothing suspicious should be read into his action.

The So-called "Flannery" Question

This question had arisen because counsel for the appellants complained that the Court of Appeal had apparently embarked on a series of criticisms over the style and content of the judgment of the trial judge. According to him, the Court of Appeal had adopted what he called the "Flannery" approach citing the English case of *Flannery v. Halifax Estates Agencies Ltd* [2000] 1 WLR 377 which purportedly established the principle that inadequate reasoning or an inadequate judgment by a trial judge would itself be a valid ground of appeal. Counsel reiterated that the approach in Flannery was subsequently reversed by the English Court of Appeal in *English v. Emery Reimbold & Strick Ltd.* [2002] 3 All ER 385 wherein Lord Phillips MR said under the heading "The Approach of the Appellate Court":

> Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of material evidence and submissions at the trial, in order to determine whether, when all these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this Court in the light of *Flannery*'s case, in *Ludlow v. National Power plc* [2000] All ER (D) 1868. If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.

In our view, the approach taken by Lord Phillips is eminently sound. The Court of Appeal had adopted such an approach in this case. It had reviewed the various conclusions or findings arrived at by the High Court in the context of the material evidence and submissions at the trial. In the circumstances, we find no merit in the appellants' counsel's complaint on this score.

In rounding up its judgment, the Court of Appeal touched on the rationality of the will and made the following observations:

> First, the deceased was in his last illness when he made his will. No doubt the deceased was never told about the aggressive nature of the disease he was suffering from. Nevertheless, it is more than probable from the state of his own physical health that the deceased knew that he was very ill and may not last long. He could not swallow. He was losing blood and needed a transfusion. In this state of affairs it was quite natural for him to want to make a will. In fact, he had asked his usual solicitor to attend on him to prepare a will. But his solicitor did not keep the appointment. So, the deceased made other arrangements. And entirely in keeping with his nature, he specifically asked for an inexpensive solicitor. He did not make this request of a total stranger but of a man he knew to be a close friend of his son.
>
> Second, he had, during his lifetime, treated his sons with scarce respect. With death fast approaching, he probably regretted this. Perhaps he felt remorse for what he had done. Any remorse in a dying man is a strong emotion. It may make him act in strange ways towards persons whom he has mistreated during his lifetime. His daughters were well settled. Each daughter had her own family. Neither daughter lived as part of the joint family. By contrast, the sons lived with him as part of the joint family and had nothing save a pittance as salary. He was probably most concerned about their future. Hence, there was every reason for the deceased to prefer his sons to his daughters.

We quite agree with the observations made by the Court of Appeal with one minor exception. Here, the Court of Appeal drew the inference that the deceased could have made his will more favourable to his sons out of remorse for his mistreatment of them. We are not sure that is a fair observation. Although the evidence shows that he treated his sons more like employees and paying them low wages, he nevertheless looked after their families well, providing them financial support in all other aspects. The children were all devoted to him. Although he might have been strict and stern there is nothing to suggest that he disliked his sons or mistreated them. From the evidence as a whole, it seems clear that the deceased was deeply rooted in the traditional Chinese feudal system. Viewed in that context, it would not be unreasonable to assume that he would want his sons to perpetuate his name in the business empire he created. His sons had not only lived with him in the same house but had worked for him for many years whereas the daughters, as observed by the Court of Appeal, had lived apart with families of their own. They appeared to be financially sound independently. Given those circumstances, there was no reason why he should not have executed his will more in favour of his sons than the daughters. In our view, it is a perfectly conceivable gesture.

Conclusion

As we said at the outset, the questions postulated can be effectively dealt with under the 5 specific heads covered in this appeal. In our view, the Court of Appeal had correctly dealt with the issues raised thereunder, both on points of law and on the facts. In the circumstances, and for the reasons stated, we find no merit in this appeal. We therefore dismiss it with costs and order that the deposit be paid out to the respondents to account of their taxed costs.